Malayan Flour Mills Sdn Bhd v Raja Lope & Tan Co & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-62 OF 1997
NIK HASHIM J
16 FEBRUARY 1998

***Contract** — Building contract — Termination — Termination under standard term contract after letter of warning had been issued — Whether employer can have resort to termination under common law after having exercised its contractual rights*

***Contract** — Building contract — Standard terms — Termination under standard term contract after letter of warning had been issued — Whether employer can have resort to termination under common law after having exercised its contractual rights*

The applicant and the respondent were parties to a standard form contract for some civil and building works. When the engineer found the respondent's progress on site to be unsatisfactory, two warning letters were sent. Subsequently under cl 63 of the conditions of contract, the engineer certified that the respondent was not executing works in accordance with the contract and was persistently neglecting to carry out its obligations under the contract. On 2 August 1989, the applicant pursuant to cl 63 of the contract issued a termination notice ('the termination notice') to the respondent, thus terminating the contract. The respondent disputed the validity of the termination and at arbitration, the arbitrator found that the termination notice was premature and therefore invalid. The arbitrator also decided in his award that since the applicant had exercised its contractual rights, it could not resort to the remedy of termination under common law. The applicant argued that the arbitrator had misconducted himself in so deciding and applied for the award to be set aside. The key issue to be decided by the court was whether having exercised its contractual rights, the applicant could resort to the remedy of termination under common law.

Held, dismissing the application:

The arbitrator's findings that the applicant was not entitled to resort to common law where its rights under the contract had been exercised, and that there was no satisfactory evidence whereby the applicant could lawfully determine the contract under cl 63(1)(d) of the conditions of contract were correct. Since the termination was bad in law, it followed that the termination was unlawful. There was thus no misconduct on the part of the arbitrator (see pp 382F and 383A); *Mvita Construction Co Ltd v Tanzania Harbours Authority* (1988) 46 BLR 19 followed; *Architectural Installation Services v James Gibbons Windows* (1989) 46 BLR 91 distinguished.

[**Bahasa Malaysia summary**

Pemohon dan penentang merupakan pihak-pihak kepada satu kontrak bentuk seragam untuk kerja-kerja sivil dan pembinaan. Apabila jurutera mendapati bahawa kelancaran kerja penentang di tapak pembinaan tidak memuaskan, dua pucuk surat amaran telah dihantar. Kemudiannya di bawah fasal 63 terma-terma kontrak, jurutera telah mengesahkan bahawa penentang tidak menjalankan kerja-kerja mengikut kontrak dan sering gagal menunaikan kewajipannya di bawah kontrak. Pada 2 Ogos 1989, pemohon mengikut fasal 63 kontrak itu telah mengeluarkan satu notis penamatan ('notis penamatan tersebut') kepada penentang, lantas menamatkan kontrak. Penentang mempertikaikan kesahan penamatan itu dan di timbangtara, penimbangtara telah mendapati bahawa notis penamatan tersebut adalah terlalu awal dan oleh itu tidak sah. Penimbangtara juga memutuskan di dalam awardnya bahawa memandangkan pemohon telah menjalankan hak-haknya di sisi kontrak, ia tidak boleh menggunakan remedi penamatan di bawah common law. Pemohon menegaskan bahawa penimbangtara salah ketika memutuskan sedemikian dan memohon untuk award itu diketepikan. Isu utama untuk diputuskan oleh mahkamah adalah sama ada setelah menjalankan hak-haknya di sisi kontrak, pemohon boleh menggunakan remedi penamatan di bawah common law.

Diputuskan, menolak permohonan itu:

Keputusan penimbangtara bahawa pemohon tidak berhak menggunakan common law setelah hak-haknya di sisi kontrak telah dilaksanakan, dan bahawa tidak terdapat keterangan yang memuaskan yang membolehkan pemohon menamatkan kontrak secara sah di bawah fasal 63(1)(d) terma-terma kontrak adalah betul. Oleh kerana penamatan itu salah di sisi undang-undang, kesimpulannya penamatan itu adalah tidak sah. Oleh itu, tiada salah laku pada pihak penimbangtara (lihat ms 382F dan 383A); *Mvita Construction Co Ltd v Tanzania Harbours Authority* (1988) 46 BLR 19 diikut; *Architectural Installation Services v James Gibbons Windows* (1989) 46 BLR 91 dibeza.]

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1696–1815.

Cases referred to

Architectural Installation Services v James Gibbons Windows (1989) 46 BLR 91 (distd)

Mvita Construction Co Ltd v Tanzania Harbours Authority (1988) 46 BLR 19 (folld)

Official Assignee v Chartered Industries of Singapore Ltd [1978] 2 MLJ 99 (refd)
Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor [1997] 5 MLJ 601 (refd)

Legislation referred to

Arbitration Act 1952 ss 23, 24(2)
Rules of the High Court 1980

GH Khoo (*Skrine & Co*) for the applicant.
Peter Yip Shou Shan (*Peter Yip & Yong*) for the respondent.

Cur Adv Vult

Nik Hashim J: This is an application by way of an originating motion pursuant to O 69 r 2 of the Rules of the High Court 1980 and s 24(2) of the Arbitration Act 1952 ('the Act') to set aside an award of the learned arbitrator dated 6 March 1997 or alternatively under s 23 of the Act for the award to be remitted for reconsideration on the ground of misconduct by the arbitrator and that the award on its face is bad in law.

The Malayan Flour Mills Sdn Bhd ('the applicant') and Raja Lope & Tan Co ('the respondent') were parties to a contract dated 8 March 1989 for the construction, completion and maintenance of the civil and building works for Broiler Breeder Farm at Batu Undan, Lumut, Perak ('the works'). While building works were being carried out by the respondent in 1989, the engineer sent to the respondent a letter dated 17 April 1989 complaining of unsatisfactory performance and progress on site. Later, two warning letters dated 26 June 1989 and 12 July 1989 were sent to the respondent requiring acceleration of the construction in order to achieve the objectives of the project. Finally, on 28 July 1989, the engineer certified under cl 63 of the General Conditions of Contract that the respondent was not executing the works in accordance with the contract and was persistently neglecting to carry out its obligations under the contract. On 2 August 1989, the applicant pursuant to cl 63 of the contract issued the termination notice to the respondent, thus terminating the contract. The dispute then is whether or not the termination by the applicant of the contract was a valid termination. The arbitrator, Datuk George KS Seah, decided that the termination was unlawful in his interim award, which forms the subject matter of this application.

The contract under consideration provides for two notice procedure, namely (i) a warning notice under cl 46; and (ii) a termination notice under cl 63, which reads:

> ... if the engineer shall certify in writing to the employer that in his opinion the contractor — ...

(d) is not executing the works in accordance with the contract or is persistently or flagrantly neglecting to carry out his obligations under contract, or ...

then the employer may after giving 14 days' notice in writing to the contractor enter upon the site and the works and expel the contractor therefrom without thereby avoiding the contract or releasing the contractor from any of his obligations or liabilities under the contract, or affecting the rights and powers conferred on the employer or the engineer by the contract ... .

In the present case, a warning letter was given to the respondent by the engineer on 26 June 1989 ('CH 22') and a termination notice on 2 August 1989 ('RB 126'), which reads as follows:

Ref: MF M/Adm/Project/0540/89

2 August 1989

Raja Lope & Tan Co
22a Jalan Lumut
Kompleks Damai
50400 Kuala Lumpur

Dear Sirs

Re: Dindings Broiler Breeder Farm Sdn Bhd — Civil & Building Works for Broiler Breeder Farm at Batu Undan, Lumut, Perak

We refer to the matter. Our consultant, Chester Ho, has certified to us in writing that you have not executed the works in accordance with the contract and/or have persistently/flagrantly neglected to carry out your obligations under the contract.

Pursuant to cl 63 of the General Conditions of Contract, we hereby give you fourteen (14) days' notice commencing immediately after the date of receipt of this notice to vacate the site.

Your attention is also directed to cl 53 in Pt II of the General Conditions in particular cl 53(7).

Yours faithfully

Malayan Flour Mills Bhd

sgd
Teh We Chye
Director

TWC/sy
Jasatek Sdn Bhd — Chester Ho

The only issue in this case is whether the notice of termination of the respondent's contract by the applicant by letter dated 2 August 1989 pursuant to cl 63 of the contract was lawful.

The authorities are clear that an award may be set aside if the arbitrator has misconducted himself. Misconduct occurs if the arbitrator fails to decide all the matters which were referred to him (see *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99; *Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor* [1997] 5 MLJ 601). Failure to analyse

A and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated (see *Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210). *Russel on the Law of Arbitration* (20th Ed, 1982) at p 422 says the following respecting 'misconduct':

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> It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. It may, however, be misconduct, if there are gross errors in failing to hear or improperly receiving evidence.

C The conclusions reached by the arbitrator are mixed conclusions of fact and law. In my judgment, the grounds (i), (iii), (iv) and other grounds in the notice of motion which were relied upon by the applicant in its submission that the arbitrator erred in law on the face of the award, have no merit and are unsustainable. There is no error on the face of the award. The arbitrator's award is based on facts as found by him. He did carefully

D analyse and appraise all the facts before him and came to the following conclusions:

> 8.8 I am unable to find satisfactory documentary evidence when the various work sites for HG 2, 3, 4, 5 and 7 were handed over by the employer (the applicant) to the contractor (the respondent) based

E on the records produced before me by the parties.

> 28.3 For the above reasons it was plain the ECE (the engineer) was wrong to state that the completion date for HG1 and HG3 should be 8 March 1989 (notional).
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> 28.4 Based on the above undisputed facts ECE (the engineer) erred when he alleged that by 26 June 1989 the contractor (the respondent) was

F 9½ weeks behind schedule.

> 29.4 Based on the aforesaid facts it seems to me that the contractor (the respondent) [was] not behind schedule in the completion of HG1 and HG3 when RW1 (the applicant) sent the letter dated 26 June 1989. In fact, the said letter can be said to have been despatched

G prematurely relying on mistaken facts by RW1 (the applicant) .

> 30.5 If these 15 days allowance were added to 20 July 1989 the completion date for HG1 and HG3 would be 5 August 1989.
>
> 30.6 The termination notice of the respondent (the applicant) was dated 2 August 1989 (RB 126). In short, the said notice was issued before the expiration of the completion date of HG1 and HG3.

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> 30.7 In my opinion, the termination notice (RB 126) of the respondent (the applicant) was premature and therefore invalid.
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> 35.13 I respectfully agree with the view of the Court of Appeal of Tanzania.
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> 35.14 I find there is no merit in the alternative submission of counsel for the respondent (the applicant) on the application of the common

I law.

> 38.1 For the above reasons the claimant (the respondent) has succeeded in proving that the termination notice was invalid and that the purported determination was bad in law.

Encik GH Khoo for the applicant argued that the arbitrator misconducted himself in holding at para 35 of his award that the applicant could not resort to the remedy of termination under common law when the contractual rights had been exercised; he submitted that the termination notice was valid under common law and quoted an English case of *Architectural Installation Services v James Gibbons Windows* (1989) 46 BLR 91 in support. The court held in that case that the termination was a rightful termination at common law.

Encik Peter Yip Shou Shan for the respondent on the other hand, contends that *Gibbons*' case is distinguishable on the ground that the termination letter was a general one which did not refer to the contract specifically.

The arbitrator considered *Gibbons* thoroughly in the award but was not persuaded and he declined to follow it. Instead, he followed a Tanzanian Court of Appeal case of *Mvita Construction Co Ltd v Tanzania Harbours Authority* (1988) 46 BLR 19 in arriving at his conclusions.

Having read both the cases, I with respect, agree with the arbitrator's finding that *Gibbons*' case is readily distinguishable from the present case. In *Gibbons*, the termination notice was given 11 months after the warning notice whereas in the present case the termination notice (RB 126) was dated 2 August 1989 and the warning notice on 26 June 1989 — a lapse of 38 days only. There was a sensible connection between the warning notice and the termination notice both in content and in time in the instant case.

Therefore, the arbitrator's findings based on the authority of *Mvita* that the applicant was not entitled to resort to common law where its rights under the contract had been exercised, and that there was no satisfactory evidence whereby the applicant could lawfully determine the contract on the specified cl 63(1)(d) of the conditions of contract, to my mind, are correct. Nyalali CJ in delivering the judgment of the court in *Mvita* at p 33 said:

> We accept the view that the exercise of powers conferred upon the employer under cl 63(1) of the contract does not have the effect of repudiation or rescission under the common law applicable in this country. The contract continues to subsist though in a highly modified form under which the parties are excused from further performance of their obligation under the original contract. It follows, therefore, that the respondent cannot resort to the common law remedy of acceptance of repudiation. Thus the answer to Question No 2 must be in the negative.

The contract in the instant case is a standard form contract which the parties chose to use, and as such, they are bound by its provisions. The applicant's termination notice cited that the respondent had 'persistently or flagrantly' neglected to carry out its obligations under the contract as the ground for the termination, and this ground falls squarely under the forfeiture cl 63(1)(d). Since the applicant has exercised its remedy under the contract, the applicant is bound by its terms. Accordingly, the applicant cannot resort to common law remedy to govern the termination. In this regard, the arbitrator is right.

A In the circumstances, I hold that there is no misconduct on the part of the learned arbitrator. There are no reasons for the court to interfere with his award. His conclusions are correct. Since the termination is bad in law, it follows that the termination is unlawful.

In the event, I dismiss the motion with costs.

B *Motion dismissed with costs.*

Reported by Kevin Ooi

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